

No. 1-11-2598

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 19094
	)	
CRISTO HERNANDEZ,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* Judgment entered on defendant's conviction of armed habitual criminal affirmed over defendant's contention that, in sentencing him, the trial court improperly considered two prior convictions which were inherent in the offense.

¶ 2 Following a jury trial, defendant Cristo Hernandez was convicted of the offense of armed habitual criminal and sentenced to 15 years' imprisonment. On appeal, he solely contends that his sentence should be vacated and his cause remanded for a new sentencing hearing because the trial court improperly considered his two prior convictions which are inherent in the offense of armed habitual criminal.

¶ 3 The record shows that defendant was charged with, *inter alia*, the offense of armed habitual criminal in that he knowingly possessed a firearm after he had been previously convicted of arson and aggravated unlawful use of a weapon. He was convicted on evidence showing that at 4 a.m. on October 10, 2009, several uniformed Chicago police officers heard gunfire while

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driving in the area of 37th Street and California Avenue in Chicago and observed a man, who was a member of the Latin King gang, shooting at members of an opposing gang, the Two-Six gang. Officer Lawrence Stiles jumped out of his marked squad car and proceeded toward the shooter, who then threw his gun and jumped into a pickup truck driven by defendant, who was also a member of the Latin Kings. Defendant accelerated and drove directly toward Officer Stiles missing him by a foot. The officer quickly moved out of the way as he fired his gun in the direction of defendant, who drove by the marked squad car where Officer Daniel Markus was seated. Defendant pointed a gun at Officer Markus, who fired his gun in the direction of defendant, hitting his truck. Defendant kept driving, pursued by police, and was later apprehended by Officer Rodolfo Ortiz. No firearms were found in the vehicle or on defendant.

¶ 4 The parties stipulated that defendant had been previously convicted of two qualifying felony offenses for armed habitual criminal, namely, arson and aggravated unlawful use of a weapon (Uuw). The jury ultimately found defendant guilty of the offense of armed habitual criminal.

¶ 5 At sentencing, defendant's brother Moses Gonzalez, and his father Cristo Hernandez, were called as mitigation witnesses. They testified that defendant was a loving father, and that after defendant's wife died of cancer, he became more responsible for himself and their children, and was employed. Gonzalez also testified that defendant used to be a gang member.

¶ 6 Defendant spoke in allocution, insisting that he was not guilty. He then asked the court to disregard his background because he was not the same person. He stated that since he was incarcerated from 2007 to 2009, he worked hard to earn his GED, and when he came home, he tried to change, but it was difficult for him to find a job with his history. He also pointed out that he has not received any disciplinary tickets while incarcerated, and that he is focused on getting his children back.

¶ 7 In aggravation, the State noted that defendant could have driven away, but, instead, turned his vehicle toward the officers and pointed his gun at Officer Markus, showing an absolute

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disregard for human life, the officers, and the law. The State informed the court that defendant's serious violent background had escalated, starting with a 2002 conviction for possession of a handgun, and ending with the instant offense, which involved a shooting against rival gang members and defendant pointing his gun and driving in the direction of responding officers. The State also noted that defendant's violent history was illustrated by his prior convictions for unlawful vehicular invasion and arson.

¶ 8 The court sentenced defendant to 15 years' imprisonment. In doing so, the court stated that it considered the factors presented in aggravation and mitigation, the pre-sentence investigation report, the arguments of counsel, the statements of defendant, and the facts of this case. The court also considered defendant's background, including his social and family history, the fact that he has two young children, his employment and his potential for rehabilitation. The court found that Gonzalez's testimony that defendant was no longer a gang member was contradicted by defendant's own trial testimony, and that defendant's background showed a disregard for the law. The court noted that in 2002, defendant received probation for aggravated UUV, and violated his probation for that offense when he committed an unlawful vehicular invasion. He was then sentenced on the vehicular invasion to four years' imprisonment, and while he was on parole, he committed arson and was sentenced to five years' imprisonment. The court further stated that the "facts of this case are aggravating," noting that defendant was a three-time convicted felon out on the street with a weapon, placing the lives of the officers in danger. The court also commented that if defendant was a good father, he would have been home watching his children instead of on the street with a gun.

¶ 9 On appeal, defendant solely contests the propriety of his sentence. He maintains that the trial court improperly considered his two prior convictions, namely, arson and aggravated UUV, because those convictions are implicit in the offense of armed habitual criminal. Defendant acknowledges that he has waived this issue by failing to raise it in a post-sentencing motion, but maintains that we may review it for plain error.

¶ 10 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). In the context of a sentencing hearing, we will review an error that is not properly preserved as plain error where the evidence is closely balanced or the error is so fundamental that it may have deprived defendant of a fair sentencing hearing. *People v. Thomas*, 178 Ill. 2d 215, 251 (1997).

¶ 11 Here, defendant claims that the evidence adduced at the sentencing hearing was closely balanced where he presented mitigating evidence that he was solely responsible for his two young children, and that prior to his arrest he earned his GED and was employed. The State disagrees and asserts that no error occurred in the imposition of defendant's sentence.

¶ 12 The record shows that besides defendant's two prior qualifying offenses for armed habitual criminal, defendant had also been convicted of possession of a handgun and unlawful vehicular invasion, and admitted that he was a member of Latin Kings. The State referenced the facts of the offense, and the court found them "aggravating" in that they showed that defendant was involved in a shooting against rival gang members, that he was out on the street with a weapon, and put the lives of the police officers in danger. Although defendant claims that these factors were offset by the mitigating evidence presented on his behalf, the comments of the court reflect that the representations that defendant had assumed his familial responsibilities was contradicted by his actions in this case, which continued his violent criminal history. It is thus evident that the evidence at defendant's sentencing hearing was not so closely balanced as to require plain error review.

¶ 13 We also find no fundamental error which denied defendant a fair sentencing hearing to overcome his forfeiture of his sentencing issue. The 15-year sentence imposed on defendant's conviction of armed habitual criminal clearly falls within the Class X sentencing range of 6 and 30 years for that offense. 720 ILCS 5/24-1.7(b) (West 2010); 730 ILCS 5/5-4.5-25 (West 2010). Defendant maintains, however, that the trial court improperly considered his two prior

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convictions for arson and aggravated UUV, which are implicit in the offense of armed habitual criminal in making its sentencing determination. He takes particular issue with the court's reference to these prior convictions, and its statement that he was a "[t]hree times convicted felon" in announcing its sentencing decision, and maintains that the court's consideration of these offenses amounted to improper double enhancement.

¶ 14 We note initially that the comments of a sentencing court cannot be viewed in isolation (*People v. Walker*, 2012 IL App (1st) 083655, ¶32), and that in determining whether a sentence is improperly imposed, a reviewing court should consider the record as a whole (*People v. Estrella*, 170 Ill. App. 3d 292, 297-98 (1988); *People v. Curtis*, 354 Ill. App. 3d 312, 326 (2004)). Here, by contrast, defendant's argument is based almost completely on the court's reference to his prior arson and UUV offenses which were included in the armed habitual criminal charge.

¶ 15 Although a factor inherent in an offense may not be considered as a factor in aggravation at sentencing (*People v. Conover*, 84 Ill. 2d 400, 404 (1981)), every reference by a sentencing court to a factor implicit in the offense does not constitute reversible error (*People v. Burge*, 254 Ill. App. 3d 85, 91 (1993)). Further, in setting a term of imprisonment, the trial court must not only consider the nature and circumstances of the crime, but also defendant's conduct in it, as well as his character and criminal background (*People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010)), which, in turn, may be considered as a reason to impose a longer prison term (730 ILCS 5/5-5-3.2(a)(3) (West 2010)).

¶ 16 Here, as set forth above, the record shows that the trial court considered defendant's criminal history, the factors presented in mitigation and aggravation, and the circumstances of the offense and defendant's actions in committing it. *People v. Saldivar*, 113 Ill. 2d 256 268-69 (1986). The court specifically stated that defendant had shown a complete disregard for the law, noting his violation of the probation imposed on his UUV conviction and that he committed arson while out on parole for another offense, which are proper aggravating factors. *People v. Bourke*, 96 Ill. 2d 327, 333 (1983); *People v. Fugitt*, 87 Ill. App. 3d 1044, 1046 (1980).

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¶ 17 The court balanced his criminal history and other aggravating factors against the mitigating evidence presented by defendant, and was not persuaded that defendant had truly mended his ways. The court noted the serious and violent nature of the instant offense, where defendant aimed a gun at police officers, placing their lives in danger, and shot at rival gang members. The court then found that defendant's actions belied his concern for, and attention to, his children. The court also reviewed defendant's criminal history, including possession of a handgun and aggravated vehicular invasion, as well as the judgments entered on his convictions of arson and aggravated UUV.

¶ 18 Considering the record as a whole, we find no improper consideration by the trial court in the mere mention of defendant's prior convictions for arson and aggravated UUV. *Estrella*, 170 Ill. App. 3d at 297-98. As this court observed in *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982), the statutory requirement that the trial court specify on the record the facts that led to its sentencing determination "was not intended to be a trap" for the sentencing court. Here, we find no fundamental error, and accordingly, no plain error. Thus, we find that the issue is waived. *Thomas*, 178 Ill. 2d at 252.

¶ 19 In reaching this conclusion, we find defendant's reliance on *People v. White*, 114 Ill. 2d 61, 65-66 (1986) misplaced. In *White*, 114 Ill. 2d at 65-66, defendant was convicted of aggravated battery of a child, and the trial court, in sentencing defendant, improperly considered the fact that the victim was under the age of 13, which was an element of the offense. That said, the supreme court found that little weight was placed on that factor in light of the numerous other aggravating factors, and that remanding for resentencing was thus unnecessary. *White*, 114 Ill. 2d at 67-68. Likewise here, we find that any weight placed on defendant's two prior felony convictions was minimal and had no impact on the sentence imposed given the other aggravating factors.

¶ 20 We, therefore, affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.

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